IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982
NO. 82-1287

RANDOLPH ASSOCIATES, a partnership composed of Howard Bass, Lawrence Berger, Clayton Holding Co., a New Jersey corporation, Steven Rachlin, SBS Associates, Ltd., a partnership, and Howard Wachtel,
Petitioner,

v.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, AND RONETCO, INC.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 22.6, petitioner Randolph Associates submits this supplemental brief in support of its pending petition for a writ of certiorari in order to discuss Crimpers Promotions, Inc. v. Home Box Office, Inc., and Showtime Entertainment Corp., 1982-3 Trade Cas. (CCH) ¶65,123 (S.D.N.Y. Dec. 30, 1982), a case not available when the petition was prepared. Unlike the Court of Appeals below in the case sub judice, the court in Crimpers considered and applied Blue Shield of Virginia v. McCready, 457 U.S. -, 102 S. Ct. 2540 (1982), to sustain a plaintiff's antitrust standing against the defense, also asserted here, that it had not suffered antitrust injury.

In Crimpers, plaintiff organized a cable television trade show to provide a

forum in which independent buyers and sellers of cable programming could transact business face-to-face. Defendants Home Box Office Inc. ("HBO") and Showtime Entertainment Corporation ("Showtime") are two of the leading companies in the cable television industry and are in the business of purchasing "programming from independent producers and suppliers" and then packaging "this programming into a complete network format for sale to cable system operators." Id. at 71,287.

Plaintiff alleged that HBO and Showtime conspired to cause independent programmers, suppliers, and potential purchasers of programming, along with HBO and Showtime, to boycott the trade show. HBO and Showtime, as middlemen between independent producers of programs and cable net-

works, allegedly organized the boycott because they feared that face-to-face "stand-alone"[1] business, directly between suppliers and purchasers of programming, would reduce or eliminate HBO's and Showtime's economic power in the cable industry. Id. The trade show was held, but participation was disastrously low and plaintiff was forced to cease business. Plaintiff then filed suit contending that as a result of defendants' actions "defendants have reduced competition in the markets for the sale and purchase of programming for cable television." Id. It is significant to note plaintiff did not claim a reduction in competition as to the

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1 "Stand-alone" programming was defined as a "practice whereby a cable operator acquires programming directly from a producer or supplier and schedules it for transmission to subscribers." Id. at 71,287 n.1.

business in which it was engaged, viz., production of cable television trade shows.

Defendants responded that Crimpers did not have standing under §4 of the Clayton Act, 15 U.S.C. §15, as (1) Crimpers did not directly compete with defendants in the buying and selling of cable programming, (2) Crimpers did not incur direct injury, and (3) Crimpers was "simply a means" (emphasis in the original) to defendants' ultimate goal of restraining trade in the cable television industry. Id. at 71,289. The district court rejected each of these arguments on the basis of this Court's decision in Blue Shield.

On the direct competition argument, the court found, quite correctly, that a plaintiff need not be a direct com-

petitor in the market in which defendants operate, referring not only to Blue Shield but also to Aurora Enterprises v. National Broadcasting Co., 688 F.2d 689 (9th Cir. 1982), a case discussed in Randolph's petition at 21-22. On the direct injury argument, the court found that, in fact, calculation of Crimpers' direct boycott losses would be far easier than calculation of the indirect losses incurred by defendants' direct competitors on account of an overall reduction in competition, id. at 71,291-2; similarly, in the instant case, calculation of Randolph's losses due to defendants' aborting of the real estate development is far easier than calculation of losses suffered by Shop-Rite consumers due to the per se illegal horizontal territorial allocation of markets.

On the argument that "destruction of plaintiff's trade show was arguably only a means by which defendants sought to restrain trade" (id. at 71,291; emphasis added), the court said:

> It was never suggested in McCready that the refusal to reimburse subscribers for psychology services was any more than a mere means to further the defendants' goal of reducing competition in the market for psychotherapy services.
>
> Id. at 71,291 (emphasis added).
>
> Under these facts, Crimpers was no mere supplier or customer, tangentially related to the goal of the conspiracy. As in McCready, the boycotting and intended destruction of plaintiff's trade show was one of the clearest and most direct means by which to achieve defendants' alleged goal of

> restraining trade in the buying and selling of cable programming on a stand-alone basis.
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> Id. at 71,292 (emphasis added).

The Crimpers case underscores an important point Randolph made in its petition: Randolph, having been injured by the means used to accomplish the Sherman Act-proscribed restraint upon the market in which defendants were engaged, has §4 antitrust standing even though it was not in the business in which defendants were engaged. Like the plaintiff in Blue Shield and Crimpers, Randolph was the victim of the means used to achieve the illegal restraint.

If the decision below remains, an ineluctable conflict between the circuits

results---those which do apply this Court's Blue Shield standing criteria, and the Third Circuit which literally ignored Blue Shield.

Respectfully submitted,

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